

1-1-2005

# 90 Years and Two Days in Forty-Five Minutes

Stephen Calkins

Wayne State University, [calkins@wayne.edu](mailto:calkins@wayne.edu)

---

## Recommended Citation

Stephen Calkins, *90 Years and Two Days in Forty-Five Minutes*, 72 Antitrust L. J. 1183 (2005).

Available at: <http://digitalcommons.wayne.edu/lawfrp/15>

This Article is brought to you for free and open access by the Law School at DigitalCommons@WayneState. It has been accepted for inclusion in Law Faculty Research Publications by an authorized administrator of DigitalCommons@WayneState.

## NINETY YEARS AND TWO DAYS IN FORTY-FIVE MINUTES

STEPHEN CALKINS\*

The Federal Trade Commission throws unusually good parties. Why this is true is not obvious—but it is obviously true. Perhaps the ability to party well is inherent in a collegial body. Democrats and Republicans, liberals and conservatives, are forced to coexist. Although the agency has experimented with strife, harmony has proven the superior approach. And how better to harmonize than through parties?

Every FTC alum has favorite memories of inaugural parties, farewell parties, and holiday parties. Who can forget the time that—and discretion prevents the printing of the tale. So enamored of parties are FTC-ers that they continue going to FTC parties even after graduating from the agency, so to speak, as proven by the continued existence of the Castro C. Geer Chapter of the Federal Trade Commission Alumni Association.<sup>1</sup>

To the list of fabled parties must now be added the Commission's 90th birthday party. The author of this commentary was drafted to attend the proceedings and then share reflections on the highlights and low-lights. Those reflections, updated with the revising of papers, are recorded here.<sup>2</sup>

Also included here is one sobering conclusion: the FTC is at risk. Time and again critics ask whether, were one starting anew, it would make sense to have two antitrust agencies—with the answer always being “no”

---

\* Professor of Law and Director of Graduate Studies, Wayne State University Law School. The author served as General Counsel of the FTC from 1995–1997, after serving an early stint as attorney-advisor to Commissioner Stephen Nye.

<sup>1</sup> For a rare preserved relic of one of these parties, see Thomas Leary, *The Spell of the Gherkin*, Remarks Presented at the Castro C. Geer Chapter of the Federal Trade Commission Alumni Association Annual Business Meeting (Dec. 18, 2002), available at <http://www.ftc.gov/speeches/leary/spellofthegherkin.htm>.

<sup>2</sup> The Commission also celebrated its 75th anniversary with a symposium. See *Federal Trade Commission 75th Anniversary Symposium*, 58 ANTITRUST L.J. 797 (1989). Seven participants in that symposium took turns on stage for the 90th. Sadly, although then-Chairman Steiger expressed the hope that “we are all here for the 100th,” *id.* at 797, several participants—including Chairman Steiger—are no longer with us.

and the inference being that we should think about abolishing one (always the FTC). Even today, after a singularly successful decade of accomplishments, the FTC faces the same old questions. How much more searing will be the scrutiny when things go poorly? Yet the Commission faces these challenges with its own special strengths—strengths that have carried it for ninety years and are likely to carry it for many more.

## I. MY PERSONAL HIGHLIGHTS

Selecting highlights from an event such as this is a fool's errand. The conference was one long highlight. That said, the conference organizers chose someone with tenure to close the conference by reminding listeners—and, here, readers—of particularly interesting points. There follows an idiosyncratic list of things that I especially enjoyed. Some are individuals, some are sessions, some are points raised. (Individuals who happen to be omitted are begged to remember the context under which this was done—and that this is merely a list of what struck one observer at the time as particularly interesting.) As a bonus, an appendix records many of the program's most memorable lines and some entertaining insights into program participants.

1. *The Two Chairmen Together*. It was a special delight to see former Chairmen Pitofsky and Muris sharing the stage. That doesn't happen very often. Chairmen and their predecessors rarely appear together, in part because it is the incumbent Chairman who is really newsworthy and in part because it could be unseemly for holders of that office to criticize each other. Indeed, in their joint appearance each distinguished guru strenuously worked to avoid differing with the other, even with respect to topics (such as privacy legislation or vertical mergers) where their respectful differences are well known.

The session demonstrated more than that Muris and Pitofsky are friends. It is generally agreed that these are two of the more eminently qualified persons ever to serve as Chairman.<sup>3</sup> Both gave much to the institution. Their exchanging thoughts about the agency and its special role served uniquely to emphasize their commitment to helping it succeed.

2. *The FTC's Resident Historian*. Marc Winerman, an outstanding career FTC attorney, deservedly received substantial credit for the very existence

---

<sup>3</sup> See, e.g., Richard Posner, *The Federal Trade Commission: A Retrospective*, *supra* this issue, 72 ANTITRUST L.J. 761 (2005).

of the event. His devotion to FTC history, exemplified by his exhaustive work on the origins of the FTC,<sup>4</sup> helped inspire this celebration.

Although one could highlight many of Winerman's historical insights without committing error, one particularly striking point deserves mention: the early FTC voted to establish a chairmanship so weak that not only did it lack special powers, but it rotated annually!<sup>5</sup> Majority vote decided promotions, performance ratings, and the forgiving of annual leave. Is it any wonder that the Commission failed to establish an agenda that attracted substantial credit and support? Too often we forget that such administrative process decisions can have profound effects on performance.<sup>6</sup>

3. *The Story of the Cigarette Rule.* Four different contributions discuss the Cigarette Rule,<sup>7</sup> and rightly so. That rulemaking proceeding is "correctly regarded even now as one of the high points in the Commission's history."<sup>8</sup>

The story has a better beginning than end. The Surgeon General's much-anticipated report on smoking and health was issued on Saturday, January 11, 1964. Chairman Paul Rand Dixon and Commissioners Philip Elman and Everette Macintyre sat waiting in Chairman Dixon's office. (All three had been appointed by President Kennedy. The fourth Commissioner, Sigurd Anderson—one seat was vacant—was not present. He left the Commission February 29, 1964.<sup>9</sup>) A staff member brought in copies of the press release and the report and the three of them just

---

<sup>4</sup> Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003).

<sup>5</sup> Mark Winerman, *The First 90 Years, Promise and Performance* 34–35 (Sept. 22, 2004), Transcript, available at <http://www.ftc.gov/ftc/history/transcripts/040922transcript001.pdf>.

<sup>6</sup> Also worthy of special note is the close connection between the FTC and the SEC. How many of us remembered, if we ever knew, that the FTC was the original enforcer of the Securities Act of 1933 and gave the SEC some of its earliest commissioners (with the advantage to the SEC being to the disadvantage of the FTC). See Mark Winerman, *The FTC at Ninety: History Through Headlines*, *supra* this issue, 72 ANTITRUST L.J. 871, 880 (2005).

<sup>7</sup> *Unfair or Deceptive Advertising and Liability of Cigarettes in Relation to Public Health Hazards of Smoking*, 29 Fed. Reg. 8324 (July 2, 1964). See William MacLeod et al., *Three Rules and a Constitution: Consumer Protection Finds Its Limits in Competition Policy*, *supra* this issue, 72 ANTITRUST L.J. 943 (2005); Sidney M. Milkis, *The Federal Trade Commission and Consumer Protection: Regulatory Change and Administrative Pragmatism*, *supra* this issue, 72 ANTITRUST L.J. 911 (2005); Posner, *supra* note 3; Teresa Moran Schwartz & Alice Saker Hrdy, *FTC Rulemaking: Three Bold Initiatives and Their Legal Impact*, available at <http://www.ftc.gov/ftc/history/docs/040922schwartzhrdy.pdf>.

<sup>8</sup> Posner, *supra* note 3, at 769.

<sup>9</sup> 4 Trade Reg. Rep. (CCH) ¶ 9562 (Commissioner terms).

started reading. When they finished, Chairman Dixon, a “pretty heavy smoker . . . put down his cigarette and said, ‘That’s my last cigarette.’”<sup>10</sup>

Elman offered to “see if I can draft something over the weekend,” and proceeded, with the help of his “genius assistant, Dick Posner,” to draft a notice of proposed rulemaking.<sup>11</sup> Seven days later (also on a Saturday, so as not to roil the markets) the Commission issued a notice of proposed rulemaking. The Commission then held hearings, “not before some staff officer or hearing examiner,” but before the Commissioners themselves.<sup>12</sup> The following July the Commission promulgated its final rule to require all cigarette packaging and advertising to disclose “prominently” that smoking “may cause death from cancer.”<sup>13</sup>

What a great story! The Commissioners gather on a Saturday collectively to read a report; within a week they propose rulemaking that frontally takes on one of the most powerful industries in America; they personally hold hearings and gather evidence; and they issue a final rule in less than six months. They did all this, moreover, in the face of considerable pressure from the White House and other political forces urging delay. As Elman has written, “This was Dixon’s finest hour.”<sup>14</sup> “With all the complaints I’ve had about Rand Dixon and all of his disqualifications for the job, his politicking, his everything else, Dixon did not waver on cigarettes. He saw this as something the Federal Trade Commission had to do.”<sup>15</sup>

4. *Recognition of Philip Elman.* It is frightening what kids do not know. For the college class of 2008, Orson Welles, Roy Orbison, and Cary Grant have always been dead—and aspirin has always been used to keep people

---

<sup>10</sup> NORMAN I. SILBER, *WITH ALL DELIBERATE SPEED: THE LIFE OF PHILIP ELMAN, AN ORAL HISTORY MEMOIR* 342 (2004).

<sup>11</sup> See *id.* (“Dick Posner is probably a genius in his ability to turn out work that’s first rate, and quickly. He has a great capacity to absorb masses of facts and arrange them in his brain, and out it comes. And his first drafts are like other people’s last drafts, only better.”).

<sup>12</sup> *Id.* at 343–44.

<sup>13</sup> Unfair or Deceptive Advertising and Liability of Cigarettes in Relation to the Public Health Hazards of Smoking, 29 Fed. Reg. 8324, 8375 (July 2, 1964); see, e.g., MacLeod et al., *supra* note 7, at 947. Elman, who claims to have written the FTC’s warning, explained, “Notice that that warning has the two trigger words, *death* and *cancer*. It’s all I cared about. I wanted those two words in every cigarette ad.” LIFE OF PHILIP ELMAN, *supra* note 10, at 343.

<sup>14</sup> LIFE OF PHILIP ELMAN, *supra* note 10, at 345.

<sup>15</sup> *Id.* at 345–46. Elman concluded his memoir’s discussion of the Cigarette Rule: “I think that of all the things that I did at the commission, the FTC cigarette rule is one of the things I’m proudest of—even though in the end it got nowhere.” *Id.* at 349.

from dying of heart attacks.<sup>16</sup> The question is not what youth have forgotten but what (and about whom) they never learned.

Thus, it was gratifying to see Philip Elman, one of the most distinguished of all commissioners, receive such deserved attention.<sup>17</sup> Chairmen dominate the modern Commission, yet relatively few Chairmen leaving a lasting mark. How much more impressive is it that a non-Chairman Commissioner could be recognized as playing a critical role!

5. *Lessons from People Who Were Present at the Creation.*<sup>18</sup> The conference's greatest thrill, for me, was listening to people who had actually participated in Commission history. Anyone can analyze and describe, but only persons who were fortunate enough to be there can share recollections of what transpired.

Edward Cox was foremost among these.<sup>19</sup> What a great image! Ed Cox working to finish the Nader Report,<sup>20</sup> driving around Washington in a car with a stick shift he could not work, running red lights, while Nader himself rode shotgun without a seatbelt! And then working feverishly to finish the project, sleeping four hours a night at his brother's place—and, in the end, helping to launch the Nader Empire. As Cox noted, that Empire helped jump-start the consumer movement that culminated in Chairman Pertschuk's appointment. (Also intriguing, especially to those of us old enough to remember Cox's celebrated wedding of Tricia Nixon, was Cox's recitation of a series of progressive actions taken by President Nixon.)

Cox shared an insight worth emphasizing. Agencies are born with a kind of "agency DNA," he said. One can truly understand an agency only by understanding that DNA—which is yet another reason why programs such as this one are so important.

Robert Pitofsky similarly shared revealing remembrances of times gone by. Especially striking, to me, was his recounting of the time that he (then Director of the Bureau of Consumer Protection), the Chairman

---

<sup>16</sup> See *Beloit College's Mindset List® for the Class of 2008*, available at <http://www.beloit.edu/~pubaff/mindset>.

<sup>17</sup> See Posner, *supra* note 3, at 761.

<sup>18</sup> Cf. DEAN ACHESON, *PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT* (1969).

<sup>19</sup> Edward Cox, *The First 90 Years: Promise and Performance* (Sept. 24, 2004), Transcript, available at <http://www.ftc.gov/history/transcripts/040922transcript001.pdf>.

<sup>20</sup> EDWARD F. COX ET AL., *THE NADER REPORT ON THE FEDERAL TRADE COMMISSION* (1969).

and the General Counsel sat down for an evening with three television sets, just watching the commercials!<sup>21</sup> That evening triggered four national advertising investigations. How long has it been since the Commission brought multiple network advertising cases?<sup>22</sup> Also revealing was Pitofsky's cheerful confession that he personally ignored the vertical merger guidelines.

Two speakers reminisced about critical periods in the development of modern FTC consumer protection enforcement. Howard Beales told of the origins of the Commission's important unfairness and deception statements.<sup>23</sup> David FitzGerald used a matter-of-fact tone to tell the quite thrilling tale of the development of Section 13(b) from a "curiosit[y]" into the cornerstone of the Commission's consumer protection program.<sup>24</sup> This is a remarkable story and a real tribute to imaginative, effective, patient lawyering by Commission staffers. FitzGerald drew important lessons from the saga, including to do your homework and make sure you are using such weapons as you have. (Even when it had 13(b), the Commission was persuading Congress to grant it explicit authority to seek consumer redress, in FTC Act Section 19—which has proven of little use compared to the invaluable 13(b).)

Others who recounted being "present at the creation" are not represented in this volume. Claudia Higgins reviewed the origins of carve-out settlements of merger cases.<sup>25</sup> Mary Lou Steptoe shared her perspective on some key cases litigated during her years at the Commission, describ-

---

<sup>21</sup> Robert Pitofsky and Tim Muris, *A Conversation with Tim Muris and Bob Pitofsky* 159, (Sept. 22, 2004), Transcript, available at <http://www.ftc.gov/history/transcripts/040922transcript003.pdf>; see also *More than Law Enforcement: The FTC's Many Tools—A Conversation with Tim Muris and Bob Pitofsky*, *supra* this issue, 72 ANTITRUST L.J. 773 (2005).

<sup>22</sup> Cf. REPORT OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION, 58 ANTITRUST L.J. 43, 54 (1989) [KIRKPATRICK II] (noting the rise of alternative reviewers of advertising claims and expressing divided views about whether the FTC was bringing sufficient cases, but urging the Commission to "do more to articulate its advertising law-enforcement agenda").

<sup>23</sup> Howard Beales, *Beyond Litigation: Studies, Guidelines and Policy Statements* 66 et seq. (Sept. 23, 2004), Transcript, available at <http://www.ftc.gov/history/transcripts/040923/transcript008.pdf>.

<sup>24</sup> David M. FitzGerald, *The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act* 18, available at <http://www.ftc.gov/history/docs/fitzgeraldremedies.pdf>.

<sup>25</sup> Claudia Higgins, *Injunctions, Divestiture, and Disgorgement* 28 (Sept. 23, 2004), Transcript, available at <http://www.ftc.gov/ftc/history/transcripts/040923transcript007.pdf> (tracing the remedy to the 1993–1994 investigation of the merger of American Home Products and American Cyanamid).

ing *Detroit Auto Dealers*<sup>26</sup> and the bulletproof vest cases<sup>27</sup> as “choice” cases, as that concept was described by Professor Robert Lande.<sup>28</sup> And David Scheffman importantly reminded us that *Ethyl*,<sup>29</sup> *TiO<sub>2</sub>*,<sup>30</sup> and *Cereals*<sup>31</sup> were economics-based cases:<sup>32</sup> economics has long had a central role at the Commission, including in sometimes painful episodes.

Another cautionary tale was provided by Bill Baer, who reminded us that the 1980s buzz saw of Capitol Hill attacks was triggered in part by advocacy efforts related to life insurance and agricultural cooperatives.<sup>33</sup> (Baer recalls how Senator Howard Cannon called Chairman Pertschuk to testify about the FTC’s investigation of whole life insurance, privately thanked him for helping Senator Cannon’s personal finances by alerting him to the disadvantages of the product—and then publicly blasted the agency for meddling with a valued industry!) Even if it was engaging in advocacy rather than regulation, and even if its positions had substantial merits, the Commission was taking on some politically potent industries. Baer’s reminder was a sobering response to Rob Atkinson’s call for the

---

<sup>26</sup> *Detroit Auto Dealers Ass’n*, 955 F.2d 457 (6th Cir. 1992) (affirming in part and remanding in part Commission order against automobile dealers that had agreed to be closed on weekends).

<sup>27</sup> *Personal Protective Armor Ass’n, Inc.*, 1993 FTC LEXIS 353 (Jan. 27, 1993) (consent order resolved challenge to association policies against comparative advertising of soft body armor and against competing by offering product liability insurance).

<sup>28</sup> Robert Lande, *Under One Umbrella: Integrating the Competition and Consumer Protection Missions* 281 (Sept. 22, 2004), Transcript, available at <http://www.ftc.gov/ftc/history/transcripts/040922transcript005.pdf> (in both cases “I think as attorneys at the time we were intuiting our way into a choice approach”); see also Neil W. Averitt & Robert H. Lande, *Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law*, 10 LOY. CONS. L. REP. 44 (1998); Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713 (1997).

<sup>29</sup> *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984). See George A. Hay, *Facilitating Practices: The Ethyl Case*, in *THE ANTITRUST REVOLUTION* 182 (John E. Kwoka Jr. & Lawrence J. White eds., 3d ed. 1999); Michael G. Vita, *Fifteen Years After Ethyl: The Past and Future of Facilitating Practices*, 68 ANTITRUST L.J. 991 (2001).

<sup>30</sup> *E.I. du Pont de Nemours & Co.*, 96 F.T.C. 653 (1980) (dismissing complaint alleging that unduly aggressive capacity expansion, limit pricing, and refusal to license technology illegally sacrificed short-term profits in an attempt to monopolize). See F.M. Scherer, *Antitrust, Efficiency and Progress*, 62 N.Y.U. L. REV. 998, 1015 (1987) (applauding the rejection of what would have been an “incentive-impairing precedent[.]”).

<sup>31</sup> *Kellogg Co.*, 99 F.T.C. 8 (1982) (complaint dismissed without opinion).

<sup>32</sup> David Scheffman, *Economics Comes of Age at the FTC* 112, 114 (Sept. 23, 2004), Transcript, available at <http://www.ftc.gov/ftc/history/transcripts/040923transcript009.pdf> (“Those were very carefully thought out economics-based cases. And all of them failed. . . . Interestingly, the *TiO<sub>2</sub>* case was really based on what was the new IO at that time.”).

<sup>33</sup> William Baer, *Beyond Litigation: Studies, Guidelines and Policy Statements* 90 et seq. (Sept. 23, 2004), Transcript, available at <http://www.ftc.gov/ftc/history/transcripts/040923transcript008.pdf>.



Commission to take on the funeral industry and automobile dealers.<sup>34</sup> Commissioner Jon Leibowitz sensibly responded by observing that the lesson is that you need to pick your battles.<sup>35</sup>

6. *Categorizations.* A surprising number of speakers offered categorizations that could prove helpful to our understanding of important issues. In a way, of course, this is what good analysts do. Examples that caught my attention include the following:

- Susan Creighton's suggestion that "cheap exclusion" cases are especially likely to be worth bringing.<sup>36</sup>
- John Delacourt's suggestion that state action cases can be located along a continuum from those emphasizing public interest theory (*Parker v. Brown*) to those emphasizing public choice theory (*Freedom Holdings v. Spitzer*).<sup>37</sup>
- Jonathan B. Baker, Luke Froeb, and David T. Scheffman's energetic and insightful dispute over the costs and benefits of academic vs. consulting economics.<sup>38</sup>
- Pauline M. Ippolito's very useful contrasting of the goals and culture of the FDA and the FTC.<sup>39</sup>

---

<sup>34</sup> Robert Atkinson, Beyond Litigation: Studies, Guidelines, and Policy Statements 58 et seq. (Sept. 23, 2004), Transcript, available at <http://www.ftc.gov/ftc/history/transcripts/040923transcript008.pdf>; see Testimony of Robert Atkinson Before the Federal Trade Commission Workshop on Possible Anticompetitive Efforts to Restrict Competition on the Internet (Oct. 8, 2002), available at <http://www.ftc.gov/opp/e-commerce/anticompetitive/panel/atkinson.pdf>; ROBERT D. ATKINSON, THE REVENGE OF THE DISINTERMEDIATED: HOW THE MIDDLEMAN IS FIGHTING E-COMMERCE AND HURTING CONSUMERS (Progress Policy Institute Policy Paper Jan. 2001), available at <http://www.ppionline.org/documents/disintermediated.pdf>.

<sup>35</sup> Cf. Jon Leibowitz, Beyond Litigation: Studies, Guidelines and Policy Statements 97 (Sept. 23, 2004), Transcript, available at <http://www.ftc.gov/ftc/history/transcripts/040923transcript008.pdf> (attributing remark to David Balto).

<sup>36</sup> Susan A. Creighton, D. Bruce Hoffman, Thomas G. Krattenmaker & Ernest A. Nagata, *Cheap Exclusion*, *supra* this issue, 72 ANTITRUST L.J. 975 (2005).

<sup>37</sup> John T. Delacourt & Todd J. Zywicki, *The FTC and State Action: Evolving Views on the Proper Role of Government*, *supra* this issue, 72 ANTITRUST L.J. 1075 (2005).

<sup>38</sup> Jonathan Baker, Economics Comes of Age at the FTC 139 et seq. (Sept. 23, 2004), Transcript, available at <http://www.ftc.gov/ftc/history/transcripts/040923transcript009.pdf>. Compare *id.* at 141 (Baker: "I think it's clear that [consulting] economics actually channels scholarly research in industrial organization away from the sort of basic R&D and towards application."), with 143 (Froeb: "I think that the real benefit of consulting is that it gives you the questions, and so instead of starting with an answer, you start with a question, and I think that's so rare in academia . . .").

<sup>39</sup> Pauline Ippolito, The FTC and Other Government Agencies: Conflict and Cooperation 181 (Sept. 23, 2004), Transcript, available at <http://www.ftc.gov/ftc/history/transcripts/040923transcript010.pdf>.

- Robert Pitofsky's explanation that *access* was a theme of his time at the Commission.<sup>40</sup> A series of cases—he mentioned *Time Warner*,<sup>41</sup> *Toys "R" Us*,<sup>42</sup> and *Chrysler*<sup>43</sup>—can be best understood as the Commission's working to preserve access to markets. This is an alternative vision of the role of antitrust and provides a revealing lens through which to view the work of the Commission.

7. *Further Proof that Where You Stand May Depend on Where You Sit.* All of us are captives of our background and position, and that truism was proved yet again at this workshop. Examples include the debates about whether the FTC or the Antitrust Division was better at solving the remedy puzzle. (Dan Ducore did some seat-sharing by concluding that the two agencies are converging.<sup>44</sup>)

Especially intriguing in this regard was Jodie Bernstein's good-natured attack on Lee Peeler's alleged biasing of the session on FTC consumer rulemaking. That session examined three rules: Cigarettes, Kid Vid, and Do Not Call.<sup>45</sup> Bernstein, who had worked at the Commission in the 1970s, protested that the FTC had adopted a long series of beneficial consumer protection rules—and, in particular, that in the 1970s the Commission adopted several trade regulation rules of lasting importance. She saluted especially the holder in due course rule,<sup>46</sup> which she described as a bold attempt—made in the face of fierce opposition—to help consumers without entering the swamp of litigation. (White and

<sup>40</sup> Pitofsky & Muris Transcript, *supra* note 21, at 175 ("I guess if I were to select a broad theme, it is the emphasis on access.").

<sup>41</sup> *Time Warner, Inc.*, FTC Docket No. C-3709 (D.D.C. filed Feb. 3, 1997) (consent order to address post-merger incentives for cable television system to disfavor rival programming).

<sup>42</sup> *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000) (enforcing FTC order against toy maker boycott of warehouse clubs).

<sup>43</sup> *Fair Allocation Sys., Inc.*, 1998 FTC LEXIS 81 (consent order entered Aug. 5, 1998) (ending auto dealers' pressuring Chrysler to limit allocation of popular models to rival dealer selling discounted vehicles over the Internet).

<sup>44</sup> Dan Ducore, *Injunctions, Divestiture and Disgorgement* 53–54 (Sept. 23, 2004), Transcript, available at <http://www.ftc.gov/ftc/history/transcripts/0409232transcript007.pdf> ("I think there's more of a convergence going on than people might get out of the discussion this morning . . .").

<sup>45</sup> Jodie Bernstein, *Kids, Calls and Cigarettes: Successful—and Not So Successful—Consumer Protection Initiatives* 124 (Sept. 23, 2004), Transcript, available at <http://www.ftc.gov/history/transcripts/040922transcript002.pdf> ("Why these three rules? . . . [A]re we supposed to come to the conclusion by this biased—I would say biased selection—that my Commission, the Lean, Mean Pitofsky-led Bureau was totally misguided in the '70s, leading up to this debacle with the Kid's Rule, right?"). For the papers discussing these rules, see MacLeod et al., *supra* note 7; Milkis, *supra* note 7; Schwartz & Hrdy, *supra* note 7.

<sup>46</sup> FTC Preservation of Consumers' Claims and Defenses Rule, 16 C.F.R. Part 433 (2005); see *Preservation of Consumers' Claims and Defenses: Promulgation of Trade Regulation Rule and Statement of Basis and Purpose*, 40 Fed. Reg. 53,506, 53,511 (1975).

Summers, expressing grudging admiration for “the cleverness of the rascals at the FTC” who addressed the holder in due course doctrine, observed that “[g]enerations of lawyers and law teachers are surely turning in their graves at the thought that a mere federal regulation could bring down this long established doctrine.”<sup>47</sup>) Bernstein also highlighted the Octane Rule<sup>48</sup> and the Care Labeling Rule,<sup>49</sup> which people applaud to this day.

Similarly, Cas Hobbs, who also had served at the Commission in the 1970s, argued that many of the old Commission trade regulation rules made a lot of sense and did a lot of good.<sup>50</sup> He also said that the endorsements and testimonials guides<sup>51</sup> and the Green Guides<sup>52</sup> had made real contributions.

Differing perspectives also were in evidence with respect to the GM/Toyota joint venture.<sup>53</sup> Kathy Fenton, who had been an attorney-advisor to Chairman Miller at the time, viewed it as “one of the Commission’s

---

<sup>47</sup> JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* 534–35 (5th ed. 2000). Although they believe that procedurally the Commission “has, at the least, far exceeded its appropriate reach,” they nonetheless generally applaud the consequences of that overreaching. *Id.*

<sup>48</sup> FTC Automotive Fuel Ratings, Certification and Posting Rule, 6 C.F.R. Part 306 (2005); see Final Rule Governing Certification and Posting of Octane Numbers Under Title II of PMPA, 44 Fed. Reg. 19,160 (Mar. 30, 1979).

<sup>49</sup> FTC Care Labeling of Textile Wearing Apparel and Certain Piece Goods as Amended, 16 C.F.R. Part 423 (2005); see 36 Fed. Reg. 23,883 (1971).

<sup>50</sup> Caswell O. Hobbs, Under One Umbrella: Integrating the Competition and Consumer Protection Missions 246 et seq. (Sept. 22, 2004), Transcript, available at <http://www.ftc.gov/ftc/history/transcripts/040922transcript005.pdf>; see also Caswell O. Hobbs, *Antitrust and Consumer Protection—Exploring the Common Ground*, *supra* this issue, 72 ANTITRUST L.J. 1153 (2005). Hobbs mentioned, among others, the Care Labeling Rule already highlighted, but also the Funeral Practices Rule, 16 C.F.R. Part 453 (2005); see 47 Fed. Reg. 42,260 (Sept. 24, 1982); Used Motor Vehicle Rule, 16 C.F.R. Part 455 (2005); see 49 Fed. Reg. 45,725 (Nov. 19, 1984); Labeling and Advertising of Home Insulation Rule, 16 C.F.R. Part 460 (2005); see 44 Fed. Reg. 50,242 (Aug. 27, 1979); the Franchising Rule, 16 C.F.R. Part 436 (2005); see 43 Fed. Reg. 59,614 (Dec. 21, 1978); Vocational Schools Rule, see FTC Trade Regulation Rule on Proprietary Vocational and Home Study Schools, 43 Fed. Reg. 60,796 (Dec. 28, 1978), *remanded*, Katharine Gibbs School, Inc. v. FTC, 612 F.2d 658 (2d Cir. 1979), *rulemaking terminated*, 53 Fed. Reg. 29,482 (Aug. 5, 1988) (The Commission’s Guides for Private Vocational and Distance Education, 16 C.F.R. Part 254 (2005); see 37 Fed. Reg. 9665 (May 16, 1972), remain in effect.); Door-to-Door Sales Rule, 16 C.F.R. Part 429 (2005); see 37 Fed. Reg. 22,934 (Oct. 26, 1972); Credit Practices Rule, 16 C.F.R. Part 444 (2005); see 49 Fed. Reg. 7789 (Mar. 1, 1984); and Negative Option Rule, 16 C.F.R. Part 425 (2005); see 38 Fed. Reg. 4896 (Feb. 22, 1973).

<sup>51</sup> FTC Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255 (2005); see 40 Fed. Reg. 22,128 (May 21, 1975).

<sup>52</sup> FTC Guides for the Use of Environmental Marketing Claims, 16 C.F.R. Part 260 (2005); see 61 Fed. Reg. 53,316 (Oct. 11, 1996).

<sup>53</sup> General Motors Corp., 103 F.T.C. 374 (1984) (consent order).

most significant decisions”<sup>54</sup> and a “seminal step . . . in advancing modern joint venture analysis.”<sup>55</sup> At the same time, she portrayed it as a decision that properly analyzed was quite easy (“a whole new generation of anti-trust lawyers and economists looking back . . . might well ask ‘What was the big deal?’”<sup>56</sup>). Jon Baker, commenting as an economist who actually bought one of the cars produced by the joint venture, gently protested that in the context of the times the case was not such a no-brainer as one might now think.<sup>57</sup> He pointed out that the auto industry was a tight oligopoly, entry was difficult, imports were restricted, GM and Toyota were failing to compete vigorously in small cars, and this venture could have resulted in the exchange of sensitive information. The venture technically violated Section 7 unless one took—and this was *his* take-away from the case—an economics-oriented approach.

John Kwoka, who had worked as an expert for the Commission on the matter, offered yet a different perspective: the real issue in the case, for him, was whether the Commission should have insisted that if General Motors were to enter a joint venture with a Japanese automaker, it should be with Isuzu (apparently an available option) rather than Toyota. He added that hindsight has shown that both the risks and the benefits of the venture were overstated.<sup>58</sup> (My own perspective is yet again different and turns on the then-substantial public pressure to limit Japanese imports. The FTC, which is institutionally committed to open borders, may have viewed helping Toyota circumvent voluntary export restraints as a public benefit that sufficiently offset any perceived antitrust risk.<sup>59</sup>)

Finally, note two very different perspectives on the Kirkpatrick era at the FTC. Ed Cox, with the perspective even now of a former “Nader’s Raider,” saw it as the coming together of different elements of the

---

<sup>54</sup> Kathryn M. Fenton, *GM/Toyota: Twenty Years Later*, *supra* this issue, 72 ANTITRUST L.J. 1013 (2005).

<sup>55</sup> *Id.* at 1027.

<sup>56</sup> *Id.* at 1013.

<sup>57</sup> Jonathan Baker, Price Discrimination, Professions, Joint Ventures, and Exclusionary Conduct: From Competitors to Protecting Competition 227 et seq. (Sept. 22, 2004), Transcript, available at <http://www.ftc.gov/ftc/history/transcripts/040922transcript004.pdf>; see also Jonathan B. Baker, *Two Modern Antitrust Moments: A Comment on Fenton and Kwoka*, *supra* this issue, 72 ANTITRUST L.J. 1029 (2005).

<sup>58</sup> Baker Transcript, *supra* note 57; see also John E. Kwoka, Jr., *International Joint Venture: General Motors and Toyota*, in *THE ANTITRUST REVOLUTION* 46 (John E. Kwoka, Jr. & Lawrence J. White eds., 1989).

<sup>59</sup> As yet further proof that where you stand may depend upon where you sit, this Detroit-based professor must gently protest Ms. Fenton’s referring to General Motors’s role in the 1980s as being “the largest U.S. manufacturer of automobiles.” Fenton, *supra* note 55, at 1015 (emphasis added). Thanks in part to loyal consumers, General Motors is the *world’s* largest auto maker. See, e.g., Christine Tierney & Ed Garsten, *Toyota, GM Locked in Fight*

consumer revolution.<sup>60</sup> Judge Posner, instead, emphasized the criticisms of the Kirkpatrick Commission (on which he served but from whose report he dissented)<sup>61</sup> and President Nixon's political status: "as a Republican he was predisposed to accept and act on the criticisms of an agency long dominated by Democrats."<sup>62</sup>

## II. THE FTC AT RISK

The two days of the conference were suffused with the sense that we have finally arrived at the best of all possible worlds.<sup>63</sup> Did the FTC once lack adequate tools? No more. Did it once embark on frivolous frolics? No more. Was it once the "National Nanny?" No more. Was its organization bizarre? No more. Were its leaders lacking? No more. The Commission had accomplished remarkable things and from it more remarkable things could be expected—or that seemed to be the common belief. It is not surprising that a birthday party would emphasize the positive, of course, but spirits were unusually high even for a party.

It is only appropriate, therefore, for this last writer to sound a note of caution. The FTC has always been an agency at risk. The Antitrust Division, which enjoys the comforting embrace of the Executive Branch, is not going anywhere. The FTC is more vulnerable, and remains so to this day.

Several cautionary notes need mentioning. Even the rose-colored glasses of the conference reveal some issues deserving of attention. There is much more for the agency to do. At the same time, the agency is threatened by its own success, both because too much may be asked of it and because overconfidence is a risk. Finally, it is worrisome that the FTC is under attack even today, when things are going so well.

1. *Reasons for Concern.* At the most basic level, the harmony of the program did not conceal the differences that (not surprisingly) continue to exist. Robert Pitofsky implied that almost everyone favors a "notice and consent" approach to privacy,<sup>64</sup> but in fact many people do not. Robert Lande advocated the "consumer choice" approach to antitrust

---

for *Worldwide Supremacy*, DETROIT FREE PRESS, Feb. 13, 2005, at 1A (GM sold 8,241,000 vehicles worldwide in its most recent fiscal year, Toyota 6,719,363).

<sup>60</sup> See Cox Transcript, *supra* note 19.

<sup>61</sup> AMERICAN BAR ASSOCIATION, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969).

<sup>62</sup> Posner, *supra* note 3, at 764.

<sup>63</sup> See VOLTAIRE, *CANDIDE* (Penguin Classics trans. 1947).

<sup>64</sup> Pitofsky & Muris Transcript, *supra* note 21, at 163 ("It's also true that most agree, notice, consent, access, and security are what you're entitled to in terms of privacy.").

that he has developed with Neil Averitt<sup>65</sup> as an alternative way to analyze antitrust issues. Cas Hobbs called for increased use of unfairness authority, more guidelines, and more mandatory consumer disclosures. Even at a party celebrating this “best of all possible worlds,” voices called for change.

The conference did not address but also did not conceal some slightly troubling personnel issues. Note, for instance, that we heard from the two deputy directors of the Bureau of Consumer Protection, both outstanding career Commission lawyers (one of whom is serving as acting director of the Bureau). The organizers also could have called on any of several outstanding career FTC lawyers who serve as assistant directors of the Bureau or as deputy or assistant General Counsels. The picture is somewhat different for the Bureau of Competition. Here, deputies tend to serve only for a couple of years, and, although there are notable exceptions, far fewer assistant directors are long-serving career lawyers.<sup>66</sup> Obviously the market is at work, and the financial rewards of private practice are luring away talented Commission employees. Perhaps equally talented employees are being attracted to the Bureau of Competition, and perhaps BC functions as well with high turnover as BCP does with low—but perhaps not.<sup>67</sup>

Another personnel issue, this one somewhat delicate, concerns Administrative Law Judges (ALJs). The FTC is supposed to be an expert body with a comparative advantage over the federal courts in adjudicating complicated competition and consumer protection cases. Yet the Commission has no authority to require that new ALJs be experts in any subject relevant to the Commission’s docket. Nor, for understandable reasons, is the Commission free to replace ALJs whose performance is sub-optimal. The result is that although the Commission has had some first-rate ALJs, there will inevitably be a risk that litigation at the FTC

---

<sup>65</sup> See *supra* note 28.

<sup>66</sup> Cf. Press Release, FTC, FTC Chairman Announces Staff Changes in Bureau of Competition (Deputy Director Jeffrey Schmidt appointed from private practice); *In Brief*, 87 Antitrust & Trade Reg. Rep. (BNA) 524 (Nov. 19, 2004) (Deputy Director D. Bruce Hoffman to return to private practice after two years at the Commission, including just over a year as deputy); *People*, FTC: WATCH No. 601 (Jan. 6, 2003) (Assistant Director Michael H. Knight (Mergers III) appointed from private practice). Compare Press Release, FTC, FTC Announces Reorganization of its Competition Bureau (Oct. 1, 1998) (three new assistant directors named, one from outside the FTC and one with two years’ government experience), with *FTC Bureau of Competition Organization Chart* (Aug. 2004), available at <http://www.ftc.gov/bc/bcorgchart.pdf> (all three officials no longer serving).

<sup>67</sup> Dollars also increasingly lure economists. Cf. *People*, FTC: WATCH No. 634 (June 21, 2004) (former deputy director of the Bureau of Economics, a 14-year FTC veteran, joined economic consulting firm). So many distinguished academic economists spend substantial time consulting that it is sometimes hard to identify experts who are both expert and

will be perceived not as distinctly superior to that in federal court but perhaps even as inferior. The Antitrust Modernization Commission (AMC) gave serious thought to studying what a Commission working group saw as this "good government" issue,<sup>68</sup> although in the end it elected not to pursue this FTC-focused issue. That failure to pursue the issue does not make it any less an issue.

Ironically, one of the great stories of the conference—that of the Commission's promulgation of the Cigarette Rule—illustrates a problem with the current functioning of personnel: Commissioner interaction. Recall that three Commissioners met on a Saturday, read the just-issued Surgeon General's Report, and agreed to try to write a rule. That could never happen today. Under the Sunshine Act,<sup>69</sup> three Commissioners may not have a "meeting" without publishing advance notice and inviting the public. Exemptions permit some meetings to be announced in advance but kept closed, but it is doubtful that any exemption would have protected this meeting (and, even if it had, notice of the meeting would have been required).<sup>70</sup> Commission staff can meet freely, as can Commissioner attorney advisors, but Commissioners themselves are constrained. This is a problem that impairs interaction among Commissioners on a whole series of issues, including even the writing of formal opinions.

Personnel issues aside, there is much more that the Commission could do. Antitrust ambiguities remain unresolved, but the list of BCP projects still needing work is particularly long. SPAM and identity theft continue unabated. Beyond that, recall all those statutes and trade regulation rules that Cas Hobbs saluted: no one would say that they are all ideal. For the past decade the Commission has been trying to amend the

---

unconflicted. Query, too, whether research is being affected—not biased in how it is done, but perhaps influenced in the questions asked.

<sup>68</sup> Memorandum from Civil Procedure and Remedies Working Group to All Commissioners Re: Civil Procedure and Remedies Issues Recommended for Commission Study 11–12 (Dec. 21, 2004), *available at* <http://www.amc.gov/pdf/meetings/CivilProcedure.pdf>; *see also* Report of the Section of Antitrust Law of the American Bar Association to the Antitrust Modernization Commission 9 (Sept. 30, 2004), *available at* <http://www.abanet.org/antitrust/comments/2004/CommentsModernizationCommission.pdf> (suggesting Commission attention to this issue) (the author was a member of the task force that helped prepare the Section's report).

<sup>69</sup> 5 U.S.C. § 552b.

<sup>70</sup> *See* Prepared Statement of the Federal Trade Commission Before the Special Committee to Review the Government in the Sunshine Act (Sept. 12, 1995), *available at* <http://www.ftc.gov/speeches/other/suntest.htm>; ABA Antitrust Section Report, *supra* note 68, at 9–10 (suggesting Commission attention to this issue).

Franchising Rule.<sup>71</sup> For a long time it was very hard for consumers to access appliance efficiency data on the Web.<sup>72</sup> More seriously, the Fair Credit Reporting Act<sup>73</sup> is almost unintelligible even to sophisticated users.<sup>74</sup> How has the Commission responded to this confusion? By refusing as a general matter to issue written interpretations of the Act<sup>75</sup> and by failing regularly to update its Official Staff Commentary, which is little changed from its issuance in 1990.<sup>76</sup> This is too important an act to abandon to confusion. Similarly, Truth in Lending<sup>77</sup> is a laudable principle and a nightmare reality, in which consumers are given mountains of useless information when they close on a mortgage—when it is too late, given human nature, to affect their credit-buying decision.<sup>78</sup> For that matter, even national advertising issues need attention. The Commission's Endorsement Guides are badly in need of revision.<sup>79</sup> This consumer finds comparison shopping for telecommunications service very challenging (which fees really are imposed by the government, and which might differ between service providers?); query whether jurisdic-

---

<sup>71</sup> 16 C.F.R. Part 436; see Bureau of Consumer Protection Staff Report to the Federal Trade Commission and Proposed Revised Trade Regulation Rule (Aug. 2004), available at <http://www.ftc.gov/os/2004/08/0408franchiserulerpt.pdf>.

<sup>72</sup> Cf. <http://www.ftc.gov/bcp/online/edcams/eande/index.html> (appliance data newly available).

<sup>73</sup> 15 U.S.C. § 1681 et seq.

<sup>74</sup> See ANTHONY RODRIGUEZ ET AL., FAIR CREDIT REPORTING 6 (National Consumer Law Center 5th ed. 2002) ("the Act is so poorly drafted and difficult to understand that courts are in disagreement over some fundamental questions").

<sup>75</sup> See <http://www.ftc.gov/os/statutes/fcrajump.htm> ("Except in unusual circumstances, the staff will no longer issue written interpretations of the FCRA.") (staff opinion letters end in 2001).

<sup>76</sup> Statements of General Policy or Interpretations Under the Fair Credit Reporting Act, 16 C.F.R. Part 600 Appendix. As required by Congress, the Commission has issued a series of guidance documents, 69 Fed. Reg. 69,776 (Nov. 30, 2004), but although they may help lay persons begin to understand their rights and responsibilities, they do not provide the clear answers that legal advisors require.

<sup>77</sup> 15 U.S.C. § 1601 et seq.

<sup>78</sup> See 12 C.F.R. § 226.17(b) ("The creditor shall make disclosures before consummation of the transaction.").

<sup>79</sup> The Guides, at 16 C.F.R. Part 255, were last updated in 1980. The Ninth Circuit, ruling against the Commission in *FTC v. Garvey*, 383 F.3d 891 (9th Cir. 2004), viewed the Guides as not controlling the behavior of endorsers, and said that additional guidance from the Commission or Congress would be helpful. *Id.* at 904 n.14. Particularly troubling to me is Guide 2, which authorizes the showing of a consumer making a completely unsubstantiated, atypical performance claim, so long as this is that abnormal individual's genuine belief and so long as the advertisement "clearly and conspicuously disclose[s] the limited applicability or the endorser's experience to what consumers may generally expect to achieve." 16 C.F.R. § 255.2(a). We have all seen far too many weight-loss ads with apparently typical consumers boasting of great results, with a disclaimer at the end saying something we are incapable of understanding.



tional hurdles completely prevent the Commission from doing anything to improve the situation (and query whether the hurdles could be removed).

The real worry, however, is not that the Commission will do too little, but that it will try to do too much. Congress has learned that the Commission can accomplish politically popular things and that referring matters to the Commission is an easy way to claim action. The result is that the Commission is spending increasing time promulgating rules or conducting studies demanded by Congress.<sup>80</sup> The agency is capable of only a certain amount of quality work. More generally, the Commission is at risk of being asked to solve societal problems that defy easy solutions. Obesity, and particularly childhood obesity, is only one current example.<sup>81</sup> The Commission also is at risk of being called on to joust with the politically powerful, as evidenced by the substantively meritorious call during this program for the Commission to work to facilitate direct-to-consumer Internet sales of, among other things, automobiles.<sup>82</sup>

The problem is not only that the Commission may be *asked* to do too much, but that it may *try to do* too much. Whenever things are going well there is a risk of over-confidence. Time and again a speaker at this conference observed that the Commission has never enjoyed the respect and popular support that it does now. Inevitably, there is a risk of being insufficiently critical. Thus, Professor Muris boasted that the Commis-

---

<sup>80</sup> See, e.g., Press Release, FTC, FTC Issues Study on Competition in Contact Lens Market (Feb. 15, 2005) (64-page report required by Congress), *available at* <http://www.ftc.gov/opa/2005/02/contactlens.htm>; Press Release, FTC, FTC Issues Report to Congress on Results of Studies Required by FACTA (Dec. 9, 2004), *available at* <http://www.ftc.gov/opa/2004/12/factarpt.htm>; Press Release, FTC, FTC Seeks Comments on Proposed Regulation Improving Prescreen Opt-Out Notices (Sept. 27, 2004) (rulemaking required by FACTA), *available at* <http://www.ftc.gov/opa/2004/09/prescreen.htm>.

<sup>81</sup> See *Pesterling Parents: How Food Companies Market Obesity to Children* 41 (Center for Science in the Public Interest Nov. 2003), *available at* <http://cspinet.org/new/pdf/pesteringparentsnopictures.pdf> ("Congress should give the Federal Trade Commission the authority and adequate funding to develop and implement . . . nutrition standards for foods that can be advertised and marketed to children and limit advertising and marketing for foods that do not meet those standards."); see also J. Howard Beales, III, Director of the FTC Bureau of Consumer Protection, Competition, Advertising, and Health Claims: Legal and Practical Limits on Advertising Regulation, Remarks Before the George Mason Law Review 2004 Symposium on Antitrust and Consumer Protection (Mar. 2, 2004), *available at* <http://www.ftc.gov/speeches/beales/040312childads.pdf> (reviewing challenges of childhood obesity and of the FTC's doing anything about it).

Discussing the importance of resisting pressure to take inappropriate action on obesity, Chairman Muris has noted, "Even our dogs and cats are fat—and that's not because of advertising."

<sup>82</sup> See *supra* note 34.

sion's "unfairness test" is a rigorous cost/benefit test,<sup>83</sup> whereas, although he likely applied it that way, there is nothing about the actual wording of the test that compels that result.<sup>84</sup> Or consider that the Commission is now secure that it protects "competition, not competitors." It is important to remember that similar confidence was shared by the *Brown Shoe*<sup>85</sup> Court and even very early Commissions.<sup>86</sup> This may seem to be the best of all possible worlds, but, then, some earlier eras now viewed with disdain may have seemed pretty good, too.

Even during the best of all possible times, the Commission's lasting impact depends substantially on judicial decisions. Bill Kovacic made a good case for the Commission's using all of its tools (and for measuring various outcomes), but inevitably a common law system—which is what antitrust largely is—depends on court decisions to make lasting changes.<sup>87</sup> (This is less true for consumer law, in which statutes and regulations play much larger roles.) Search the antitrust casebooks and one finds few pages devoted to speeches, consent orders, amicus briefs, hearings, and, with a notable exception, even guidelines. What one does find are court opinions.<sup>88</sup>

I still recall when, during Chairman Pitofsky's time at the FTC, we were working on the *Time Warner/Ted Turner* merger,<sup>89</sup> and someone observed that this merger was so important that it would define the Pitofsky era. Not even close, of course. It is the *Staples* court decision<sup>90</sup>

---

<sup>83</sup> Pitofsky & Muris Transcript, *supra* note 21, at 168.

<sup>84</sup> See Stephen Calkins, *FTC Unfairness: An Essay*, 46 WAYNE L. REV. 1935 (2000) (symposium issue).

<sup>85</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 & 344 (1962).

<sup>86</sup> *Beatrice Foods Co.*, 76 F.T.C. 719 (1969), 1969 FTC LEXIS 27, 163 n.21 (Jones, Comm'r) ("The Robinson-Patman Act protects *competition*, not *competitors*.").

<sup>87</sup> The court decisions that shape antitrust doctrine may be agency cases, but they may also be private cases in which an agency has made an important contribution as an amicus. See Stephen Calkins, *The Antitrust Conversation*, 68 ANTITRUST L.J. 625 (2001) (symposium issue). And competitiveness can be shaped importantly through other competition advocacy efforts outside antitrust doctrine, such as might occur through the Commission's recent work in health care and intellectual property.

<sup>88</sup> See, e.g., ANDREW I. GAVIL ET AL., *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* xxxi–xxxvii (2002) (deliberately modern casebook includes among its "principal cases" three consent orders, a complaint, an announcement of the closing of an investigation, a business review letter—and 92 reported opinions).

<sup>89</sup> *Time Warner, Inc.*, FTC Docket No. C-3709 (D.D.C. filed Feb. 3, 1997) (consent order).

<sup>90</sup> *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997).

that is in the casebooks<sup>91</sup> and is cited by Judge Posner,<sup>92</sup> among others, as a signal contribution of that administration.<sup>93</sup> Similarly, the Muris era is likely to make its lasting antitrust mark through *Arch Coal*<sup>94</sup> and the appellate decisions in *Three Tenors*,<sup>95</sup> *Schering-Plough*,<sup>96</sup> and, perhaps, *Union Oil*.<sup>97</sup> (In this connection, the brave talk about the government continuing to rely on consumer testimony to litigate merger cases is a little disconcerting.)

Perhaps the best evidence that the FTC is at risk is that it is under attack even today, when it is at a high-water mark in terms of respect and support. The AMC is once again studying whether “merger enforcement at the federal level [should] continue to be administered by two separate agencies.”<sup>98</sup> Although phrased neutrally, there is no constituency for abolishing the Antitrust Division,<sup>99</sup> so any such question actually asks whether to eliminate the Commission’s role. The Modernization Commission is also studying whether, if dual enforcement is to continue, “should steps be taken to eliminate differences in treatment arising out of which agency reviews a merger.”<sup>100</sup> The Modernization Commission clearly contemplates that any changes to reduce differences would change the FTC—not Antitrust Division—procedures and legal standards.<sup>101</sup> The more precisely that the FTC duplicates the Antitrust Divi-

---

<sup>91</sup> See, e.g., PHILLIP AREEDA ET AL., *ANTITRUST ANALYSIS* 718 (6th ed. 2004); GAVIL ET AL., *supra* note 88, at 522; E. THOMAS SULLIVAN & HERBERT HOVENKAMP, *ANTITRUST LAW, POLICY AND PROCEDURE* 855 (5th ed. 2003). Unfortunately, the Areeda casebook also includes the Commission’s *sui generis* defeat in *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285 (W.D. Mich. 1996), *aff’d per curiam*, 121 F.3d 708 (6th Cir. 1997). See AREEDA ET AL., *supra*, at 743.

<sup>92</sup> Posner, *supra* note 3, at 765 (the Commission’s “imaginative use of statistics” was a “genuine accomplishment”); see also RICHARD A. POSNER, *ANTITRUST LAW* 157–58 (2d ed. 2001).

<sup>93</sup> Some casebooks also include *Toys “R” Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000), see GAVIL ET AL., *supra* note 88, at 798; ROBERT PITOFKY, HARVEY J. GOLDSCHMID & DIANE P. WOOD, *CASES AND MATERIALS ON TRADE REGULATION* 505 (5th ed. 2003).

<sup>94</sup> *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004).

<sup>95</sup> *PolyGram Holdings, Inc.*, FTC Docket No. 9298 (final order July 24, 2003).

<sup>96</sup> *Schering-Plough Corp.*, FTC Docket No. 9297 (final order Dec. 8, 2003). After these remarks were delivered, the FTC lost on appeal. *FTC v. Schering-Plough Corp.*, 402 F.3d 1056 (11th Cir. 2005). A petition for rehearing is pending.

<sup>97</sup> *Union Oil Co. of Cal.*, FTC Docket No. 9305 (July 7, 2004) (vacating initial decision and remanding for further proceedings).

<sup>98</sup> Antitrust Modernization Commission, *Issues Selected for Study* (Jan. 13, 2005), available at [http://www.amc.gov/pdf/meetings/study\\_issues.pdf](http://www.amc.gov/pdf/meetings/study_issues.pdf).

<sup>99</sup> See Posner, *supra* note 3, at 765 (“we’re not about to abolish or reduce the authority of . . . the Justice Department”).

<sup>100</sup> See AMC, *Issues for Study*, *supra* note 98.

<sup>101</sup> That the AMC is contemplating recommending changes in how the FTC does business is clear from its background memorandum, which notes that some commentators believe

sion, however, the stronger is the argument for ending the FTC's antitrust authority.

Even the praise Judge Posner shared during the conference dinner is reason for concern. Why should an administrative agency, as well as the Justice Department, enforce antitrust laws—a question that “continue[s] to be worth asking,” he said.<sup>102</sup> He postulated three reasons: because of its possibly broader substantive mandate, because of its “capacities denied to the ordinary courts,” and because of the possible “benefits to competition among law enforcers.”<sup>103</sup> He rejected all three, and somewhat reluctantly concluded that the Commission should be retained, even though not justified in terms of governmental structure, only because “it works.”<sup>104</sup>

The problem for the Commission is that an argument for retaining the FTC only because it is performing well may vanish when, as inevitably will happen, the Commission starts performing less well. If the Commission is at a pinnacle of respect, there is only one way to go. If there are serious calls for fundamentally changing, if not eliminating, the Commission's merger enforcement authority at a time when that authority is viewed as being exercised responsibly (and, one might add, when the Antitrust Division is suffering through a string of judicial setbacks), think how strong those calls will be when the Commission is performing less well. The best evidence that the Commission will always be at some risk is that its role is being questioned precisely during these best of all possible times.

---

that “three features of FTC procedure may place companies having their transaction reviewed by the FTC, rather than by DOJ, at a relative disadvantage.” See Memorandum from [AMC] Mergers, Acquisitions, and Joint Ventures Working Group to All Commissioners Re: Mergers Issues Recommended for Commission Study 6 (Dec. 21, 2004). Conspicuously absent is any discussion of complaints that features of the DOJ procedure place firms it reviews at a relative advantage. Similarly, the Memorandum observes that “[f]airness and reason would appear to counsel for similar treatment regardless of which agency reviews a merger,” which (a) “may be a factor favoring the elimination of dual authority,” and (b) presents the question “whether the standards applicable to the FTC should—or can—be modified with respect to mergers, to make them more consistent with standards and procedures applicable to DOJ.” *Id.* at 6–7.

In this connection—and while expressly noting confidence that AMC Commissioners will act in good faith—it is nonetheless noteworthy that the Commission includes one current Antitrust Division official and four former Division officials (two former Assistant Attorneys General), whereas it includes only one former FTC official (a corporate attorney who also served four years in the Department of Justice Office of Legal Counsel). *About the Commission*, <http://www.amc.gov/bios.htm>.

<sup>102</sup> Posner, *supra* note 3, at 765.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 770.

2. *Reasons for Optimism.* Although the Commission is, and will always be, at risk, there is reason for optimism. In part, one can cynically recognize that two Congressional subcommittees enjoy jurisdiction over the Commission and would be loathe to give it up—and, more generally, the Commission is the antitrust agency traditionally more responsive to Congress and Congress is unlikely abolish such an entity. But there are more legitimate reasons to be optimistic.

First, this conference, and others like it, give reason to be upbeat. An agency that is willing to ask some hard questions, to listen to its critics as well as its fans, and to learn from its mistakes is automatically one step ahead on the road to survival, and even success. The Commission even *invites* criticism, as evidenced by BCP's telephoning various Commission observers and asking what it is doing right—and wrong.<sup>105</sup>

Second, the Commission has enjoyed some truly outstanding leadership. As Judge Posner reminded us, in 1997 Bill Kovacic wrote that "only a handful" of appointees since the late 1960s "have been experts of truly exceptional accomplishment and stature, and only a minority have brought significant antitrust or consumer protection experience to the FTC."<sup>106</sup> Yet Posner noted correctly that both Robert Pitofsky and Timothy Muris, who led the agency from 1995 through 2004, came to the position as "leading experts in the Commission's fields."<sup>107</sup> Muris accomplished the neat trick of both singing Pitofsky's praises and simultaneously challenging the agency to do better. Moreover, several recent non-Chairman Commissioners have been persons of "recognized stature," as recommended by the ABA Antitrust Section and other observers.<sup>108</sup> New Chairman Majoras brought both expertise and an open mind to the position, and by all accounts used her time as a recess appointment to good advantage by asking challenging questions. And the longer the Commission enjoys first-rate leadership, the easier it is to recruit (and persuade the President to appoint) outstanding Commissioners.

---

<sup>105</sup> I was a recipient of one of those telephone calls.

<sup>106</sup> Posner, *supra* note 3, at 768 (quoting William E. Kovacic, *The Quality of Appointments and the Capability of the Federal Trade Commission*, 49 ADMIN. L. REV. 915, 950 (1997)).

<sup>107</sup> Posner, *supra* note 3, at 768.

<sup>108</sup> See KIRKPATRICK II, *supra* note 22, at 60 ("Above all, the commissioners should be persons of recognized stature who will be respected by Congress, the businesses the Commission regulates, and the consumers it protects. With recognized leaders at its helm, the Commission will benefit from improved relations with Congress, increased deference from the courts, and acceptance by, if no cooperation from, the business community. In addition, a Commission composed of individuals of recognized stature will more readily recruit, retain, and motivate talented staff.").

Third, the FTC's staff is terrific. It was exciting at this conference to see more than a dozen career staff taking turns at microphones. That staff demonstrates a kind of commitment and professionalism that is the envy of Washington. My favorite story—and it's only one, very typical example—concerns David Shonka. The Commission was on the verge of voting out the *Joe Camel* case but there was one small problem: no lead attorney had been designated. I volunteered that Dave might be willing to move from my (General Counsel's) office to BCP and take on what promised to be an extremely grueling, indeed unpleasant, assignment. I called Dave at home and gave him overnight to consider the question, trying to reassure him that he was free to say "no." The next morning he came into my office before 9:00 a.m., and gave me his answer: "When you work at an agency and you're told that the Chairman needs you, there's really only one answer you can give."

Finally, the FTC really is special. Commission employees, current and past, demonstrate remarkable affection for the former "Little Old Lady of Pennsylvania Avenue." Indeed, this party is tribute not just to the FTC but to the warmth it engenders in those who have come to know it.

My favorite story is really Jay Shaffer's. It's about Willie Shelton, the bailiff when the Sunshine Act<sup>109</sup> opened up the dusty meeting rooms of the agency to the eager eyes of an adoring public. Worried that fans might miss a few bon mots, the Commission installed microphones in its main meeting room. This being an experiment, the agency took steps to make sure that someone—Willie Shelton—would be alerted if the system did not function. Notices were placed in spectators' chairs: They were *supposed* to say "Raise your hand if the discussion becomes inaudible," but thanks presumably to an accident, witnesses were invited to raise their hands "if the discussion becomes *incredible*" (emphasis added).

At the celebration of a birthday of a sufficiently high number, one should refrain from counting candles; likewise, we need not try to count the number of times hands would have been raised in response to such a notice. But we can observe that the Commission has done, is doing, and surely will do incredible things for years to come.

See you at the 100th.

---

<sup>109</sup> 5 U.S.C. § 552b (enacted Sept. 13, 1976).

## APPENDIX: INSIGHTS INTO PEOPLE AND MEMORABLE LINES

People let their hair down a little at parties—even public birthday parties. Thus, it should not be surprising that at the FTC’s 90th birthday party we gained a series of insights into personalities. Several that caught my attention are recorded below, after which I record some party guests’ memorable lines.

Commissioner Leary may have been the most candid, cheerfully proclaiming that (a) he thinks most breakfast cereal “is inedible, but that’s just me”; (b) “I don’t mind telling you, I will not drive a car with a foreign nameplate, period”; and (c) “I will not wear dungarees unless I’m riding a horse because I don’t want to look like a superannuated hippie.”<sup>110</sup> More substantively provocative, he noted that the Commission is highly troubled about weight-loss promotional abuses and is urging the industry to self-regulate—perhaps impliedly reassuring it that the Commission might be relatively unconcerned about potential anticompetitive consequences of such collective action among competitors.<sup>111</sup>

Chairman Muris was bracingly candid when recounting, about a previous stint at the Commission: “One of the things I did was to abolish the Office of Policy Planning so I could take back the [huge corner] Bureau Director’s office because Bob Reich talked Al Kramer out of it. Space and furniture have a lot to do with bureaucracy!”<sup>112</sup>

---

<sup>110</sup> Thomas Leary, *Under One Umbrella: Integrating the Competition and Consumer Protection Missions* 272, 277 (Sept. 22, 2004), Transcript, available at <http://www.ftc.gov/ftc/history/transcripts/040922transcript005.pdf>.

<sup>111</sup> See *id.* at 279–80; see also Thomas B. Leary, *Competition Law and Consumer Protection Law: Two Wings of the Same House*, *supra* this issue, 72 ANTITRUST L.J. 1147 (2005).

<sup>112</sup> Pitofsky & Muris Transcript, *supra* note 21, at 157–58. Youngsters may not remember that the irrepressible Robert Reich, short of stature but long on energy and imagination, served a brief stint at the FTC. See, e.g., Robert B. Reich, *The Future of Unfair Methods of Competition*, 50 ANTITRUST L.J. 801 (1982).

Professor Kenneth Elzinga, who was cited as frequently as anyone during these sessions, exuded boyish enthusiasm about learning new facts about old cases.<sup>113</sup> He set an example for all of us.

With so many great speakers, great lines were inevitable. Here is my list of wordings that stuck with me:

Marc Winerman, quoting President Taft, “I love judges and I love courts. They are my ideals on earth that typify what we shall meet afterward in Heaven under a just God.”<sup>114</sup>

Ed Cox approvingly quoted Jefferson as reportedly saying, “We need a little revolution every thirty years.”<sup>115</sup>

Mary Gardiner Jones, from the audience: “I’m sorry to intervene but I’m 86.”<sup>116</sup>

Commissioner Orson Swindle, commenting on the theme from the television show “Law and Order” that was played to introduce a consumer protection panel: “I first thought it was ‘I Heard It Through the Grapevine,’<sup>117</sup> which I assumed was going to be an introduction of how I got my background in law and antitrust and consumer protection.”<sup>118</sup>

General Counsel William Kovacic, on the importance of measuring a variety of FTC outputs: “Imagine the National Basketball Association if it doesn’t measure and track assists!”<sup>119</sup> (That is a very important point: an agency will not consistently perform functions for which it is not rewarded.)

---

<sup>113</sup> See Kenneth G. Elzinga, Price Discrimination, Professions, Joint Ventures, and Exclusionary Conduct: From Protecting Competitors to Protecting Competition 221 (Sept. 22, 2004), Transcript, available at <http://www.ftc.gov/ftc/history/transcripts/040922transcript004.pdf> (“Now, those of us who have studied or taught the *Morton* case thought we knew the economic shortcomings of the case. But John [Peterman]’s paper reveals at least for me two new twists on the *Morton Salt* plot.”).

<sup>114</sup> Winerman, *supra* note 4, at n.176 (quoting *Taft Again Defends the Supreme Court*, N.Y. TIMES, Oct. 7, 1911, at 6).

<sup>115</sup> Cox Transcript, *supra* note 19, at 83.

<sup>116</sup> Quotation is from the author’s notes.

<sup>117</sup> By Barrett Strong and Norman Whitfield, recorded in 1967 by Gladys Knight and then, memorably, in 1968 by Marvin Gaye. See ROLLING STONE, *The 500 Greatest Songs of All Time*, available at [http://www.rollingstone.com/news/story/\\_/id/6595925/sort/rank?pageid=rs.RS500&pageregion=blog&rnd=1107554554716&has-player=true&version=6.0.12.1040](http://www.rollingstone.com/news/story/_/id/6595925/sort/rank?pageid=rs.RS500&pageregion=blog&rnd=1107554554716&has-player=true&version=6.0.12.1040).

<sup>118</sup> Orson Swindle, Kids, Calls, and Cigarettes: Successful—and Not So Successful—Consumer Protection Initiatives 114 (Sept. 22, 2004), Transcript, available at <http://www.ftc.gov/ftc/history/transcripts/040922transcript002.pdf>.

<sup>119</sup> William Kovacic, The First 90 Years: Promise and Performance 85 (Sept. 22, 2004), Transcript, available at <http://www.ftc.gov/ftc/history/transcripts/040922transcript001.pdf>.



Robert Atkinson, on the problem of regulatory capture: "Consumers can buy a computer from Dell, but can't buy a Ford from Ford . . . You can't even buy a car from the manufacturer in Michigan."<sup>120</sup>

Thomas Krattenmaker, also on the problem of regulation: "Today . . . we all believe in public choice theory. Jefferson lost, Hamilton won."<sup>121</sup>

Alan Fels, on the typical U.S. reaction to foreign countries considering moving toward U.S. standards: "If they do, we'll call it convergence, and if they don't, we'll call it wrong headedness."<sup>122</sup>

And, best of all, Richard Posner, the dinner speaker who had famously dissented from the 1969 *Kirkpatrick Report* and called for the slow withering away of the Commission—and who was now wryly speculating on why he should have been the person invited to address a 90th birthday dinner: "I'm happy to stand before you contrite."<sup>123</sup>

---

<sup>120</sup> Atkinson Transcript, *supra* note 34, at 60.

<sup>121</sup> Thomas Krattenmaker, The FTC and Other Government Agencies: Conflict and Cooperation 175 (Sept. 23, 2004), Transcript, *available at* <http://www.ftc.gov/ftc/history/transcripts/040923transcript010.pdf>.

<sup>122</sup> Alan Fels, Competition and Consumer Protection in the World Economy: Conflict, Cooperation and Convergence 236 (Sept. 23, 2004), Transcript, *available at* <http://www.ftc.gov/ftc/history/transcripts/040923transcript011.pdf> (adding, "I think this is a narrow-minded sort of perspective").

<sup>123</sup> Cf. Posner, *supra* note 3, at 765 ("I am duly chastened, which is no doubt why I was invited to give this talk.").